

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF NEW YORK

-----X **Docket#**  
TORRES, : 11-cv-01368-NGG-VVP  
Plaintiff, :  
 :  
- versus - : U.S. Courthouse  
 : Brooklyn, New York  
TOBACK, BERNSTEIN & REISS :  
LLP et al, : February 5, 2014  
Defendant :  
-----X

TRANSCRIPT OF CIVIL CAUSE FOR MOTION HEARING  
BEFORE THE HONORABLE VIKTOR V. POHORELSKY  
UNITED STATES MAGISTRATE JUDGE

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1 THE CLERK: Civil Cause for a Motion Hearing in  
2 11-cv-1368, Torres v. Toback, Bernstein, et al.

3 Will counsel for the plaintiffs please state  
4 their appearance for the record.

5 MR. KESHAVARZ: Ahmad Keshavarz, the Law Office  
6 of Ahmad Keshavarz.

7 MR. BROMBERG: Brian L. Bromberg, Bromberg Law  
8 Office, P.C.

9 MR. BIZZARO: Matthew Bizzaro, L'Abbate,  
10 Balkan, Colavita & Contini, LLP.

11 THE COURT: All right. Good morning.

12 I scheduled this conference to discuss the  
13 class certification motion that has been made. It's a  
14 joint motion and it's a motion that contemplates a  
15 settlement.

16 Based on what I know about the settlement and I  
17 guess the defendants' net worth, the settlement certainly  
18 appears to me to be reasonable. The problem, however, is  
19 that the class as it's defined, I'm not sure that it  
20 meets the sort of technical requirements for class  
21 certification.

22 There's several problems, it seems to me. The  
23 class consists of two relatively disparate groups of  
24 individuals and there is no, as far as we could see it,  
25 no question that's common to the entire class unless you

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1 state the question so broadly as to make it a question  
2 that's not -- doesn't seem to fit within the parameters  
3 of Supreme Court pronouncements on the matter.

4           And so in analyzing it, we're having a little  
5 trouble articulating a truly common question that really  
6 does apply across the entire class. There are clearly  
7 common questions that apply to that portion of the class  
8 that is defined as having received a letter during the  
9 period where the defendant was not licensed as a debt  
10 collector. And they're clearly, common I think -- I  
11 think they're fairly easily identifiable common questions  
12 that apply to the other group, the smaller group that  
13 received letters that improperly sought to impose  
14 interest and collection fees. But they're if not much --  
15 there's nothing that we saw that really crosses over  
16 those two groups.

17           And that sort of effects the predominance issue  
18 too, although I mean if you look at the individual common  
19 questions that are applicable to each of the separate  
20 classes, those would predominate enough that would  
21 satisfy that requirement but you know, there is Supreme  
22 Court precedent that says that -- now let me find the  
23 exact -- right, this comes out of Dukes: "The claims must  
24 depend upon a common contention that is capable of class-  
25 wide resolution which means that the determination of its

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1 truth or falsity will resolve an issue that is central to  
2 the validity of each one of the claims in one stroke."

3           So it sort of suggests that there has to be at  
4 least one question that's common to the whole class. And  
5 the question that, you know, whether they violated the  
6 FTCPA is too broadly stated a question to constitute a  
7 question that's common to the class. I mean that would  
8 basically satisfy class status reached by any kind of  
9 case. But in any event, that's one of the issues that I  
10 wanted to discuss with you.

11           One of the solutions to that is to have some  
12 classes but if you have some classes, then you have to  
13 have separate class representatives, I think. And if you  
14 have separate class representatives, don't you have to  
15 have separate class counsel -- subclass counsel? So,  
16 that was one thing that I wanted to invite your comment  
17 on, as well.

18           Then I had a couple of other questions about  
19 the distribution of the amount. It's my memory from the  
20 papers that although I don't know how fulsome a  
21 exploration was made of the net worth of the Torres-  
22 Toback (sic) firm. I think I ordered some discovery with  
23 respect to that. You got some and my general memory is  
24 that there -- the net worth is such that the \$34,000  
25 that's going to the class, going to some -- constitutes

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1 somewhere around two percent of the net worth. Am I  
2 right about that? That's a number that's running around  
3 in my head.

4 MR. KESHAVARZ: Based on the numbers they've  
5 given us, that's correct.

6 THE COURT: Okay. So, the settlement itself is  
7 a generous settlement, I think. I mean, it's a -- on its  
8 -- I don't know if I made this observation, the  
9 settlement seems to be quite a good settlement for the  
10 plaintiffs. And so you sort of -- I hate to recommend  
11 denying the settlement because of some sort of, what I  
12 would call, more technical than really, you know,  
13 fundamental concerns about whether class certification's  
14 appropriate, but -- so those are thoughts.

15 Maybe -- I did have a question about -- I mean,  
16 the total settlement fund is something like \$47,000 or  
17 \$47,500; I did want to know a little bit more about why  
18 the named plaintiff gets so much out of that amount. So,  
19 you can comment on that too, perhaps.

20 Give me thoughts or you're going to --  
21 reactions. I'm happy to hear from you on that -- on all  
22 the various questions.

23 MR. BIZZARO: I'll allow plaintiff's counsel to  
24 begin.

25 MR. KESHAVARZ: Well, as to one of the issues,

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1 I'm not sure if this will address your concern about  
2 there being two classes. What we're calling the  
3 educational debt class which is people the law firm was  
4 attempting to collect from while the law firm did not  
5 have a debt collection license; that -- the Perkins class  
6 is a subset of that class.

7 THE COURT: Not entirely, is it? I mean  
8 because it covers a different time period. The Perkins  
9 class goes from March of 2010 to March of 2011. The  
10 educational debt class goes from August 2010 to August  
11 2011. We did think there might be some overlap, although  
12 somewhere in the papers it's characterized there's 605  
13 individuals in the class and then broken down between 496  
14 in the educational debt class and 109 in the Perkins debt  
15 class but then it occurred to us, there must be some  
16 overlap -- at least some overlap between the two which  
17 would reduce the overall number of class members.

18 MR. KESHAVERZ: My understanding and opposing  
19 counsel can correct me, my understanding is that  
20 regardless if the educational class starts a few months  
21 later or a number of months later, my understanding is  
22 that it would be the same pool of persons because they  
23 get one batch of debts to collect that are Perkins loans.  
24 So, it's the same batch. It's the same pool of people  
25 they're collecting from

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1 And opposing counsel can correct me if I am  
2 wrong but my understanding is that that pool of  
3 plaintiffs, of class members, wouldn't change even if you  
4 start the date a few months later because there's only  
5 one universe of people they're collecting from. That's  
6 my understanding.

7 So, I don't think the educational debt class,  
8 the fact that it starts shorter -- a little bit later  
9 than the Perkins class, I don't think that makes a  
10 difference in terms of the number of people.

11 MR. BIZZARO: I'm just a little confused. The  
12 educational debt class are non-Perkins individuals. We  
13 agree on that; right?

14 MR. KESHAVARZ: No.

15 THE COURT: No. That's the issue that we're  
16 actually kind of discussing is how much overlap there is  
17 between the two. Clearly, it seems to me, anyone who  
18 received a letter from Torres-Toback during the year  
19 that's specified in your class certification motion --  
20 let me back up.

21 There's about an eight-month overlap, the way I  
22 calculate it, between the --

23 MR. BIZZARO: Right.

24 THE COURT: -- Perkins loan class -- I'll call  
25 it a subclass for purposes of our discussion today --

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1 MR. KESHAVARZ: Okay.

2 THE COURT: -- subset -- let's call it a subset  
3 and the educational debt subset. There's about an eight  
4 month overlap in terms of time.

5 MR. BIZZARO: Right.

6 THE COURT: During that period, any Perkins  
7 loan person -- any person who got a letter -- I should  
8 make it a little bit --

9 MR. BIZZARO: During the --

10 THE COURT: The Perkins loan class is not  
11 limited to New York City residents.

12 MR. BIZZARO: Correct.

13 THE COURT: An educational debt class is  
14 limited to New York City.

15 MR. BIZZARO: Correct.

16 THE COURT: And so, any Perkins loan debtor who  
17 lived in New York City and received a letter during the  
18 eight month overlap period would have been both part of  
19 the educational debt subset and the Perkins loan subset.  
20 I don't know how big an overlap that is. But clearly  
21 there are people who are outside of that. In other  
22 words, there's Perkins loan people who at least as the  
23 class is defined, would fall outside of the educational  
24 debt subset.

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1 MR. BIZZARO: Right.

2 THE COURT: So --

3 MR. BIZZARO: The period you're referring to is  
4 from March of 2010 to August of 2010.

5 THE COURT: Right. That period of time for the  
6 Perkins loan group would be outside the education debt  
7 class.

8 MR. BIZZARO: Right. Plaintiffs sought to  
9 amend the complaint about I guess five months into the  
10 lawsuit and rather than oppose their efforts to amend the  
11 complaint, we reached an agreement whereby we had agreed  
12 to allow them to amend the complaint, enlarge the class  
13 but we wouldn't let it -- we did not agree to allow the  
14 class to relate back to March of 2010.

15 So, the August of 2010 to August of 2011 are  
16 non-Perkins individuals. With respect to the five month  
17 period, it's my understanding and I'll have to confirm  
18 with my clients, but I'm pretty sure that all collection  
19 efforts on Perkins loans were ceased once this lawsuit  
20 was commenced. I don't believe there would be any  
21 additional Perkins people in between that five month time  
22 period.

23 THE COURT: I'm completely lost as to what  
24 you're saying. I guess you prefaced it by saying  
25 something about an amendment of the complaint which is --

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1 I'm not sure -- you know, ultimately that doesn't affect  
2 the analysis. I'm just -- what we were talking about is  
3 whether there is any overlap and if so, how much between  
4 that subset of the class that have Perkins loan claims,  
5 let's call it that, and that subset of the class that  
6 have education debt claims. You know, were there people  
7 who received letters from Torres-Toback asserting higher  
8 than allowable interest rates and collection fees and who  
9 live in New York City who received letters after August  
10 of 2010.

11 MR. BIZZARO: My understanding is that those --  
12 the subclass, the educational debt class I should call  
13 it, are non-Perkins loans people. Those are different  
14 types of loans, not Perkins loans. So, there would be no  
15 overlap.

16 THE COURT: Okay. In other words -- but are  
17 you saying that no one -- that none of the Perkins loans  
18 letters -- none of the people receiving letters on the  
19 Perkins loan group --

20 MR. BIZZARO: Um-hum.

21 THE COURT: -- received those letters after  
22 August of 2010?

23 MR. BIZZARO: Of the Perkins loans group?

24 THE COURT: Yes.

25 MR. BIZZARO: That's -- I'm a little confused

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1 myself. I apologize.

2 THE COURT: That's all right.

3 MR. BIZZARO: I believe after March of 2011,  
4 there were no more Perkins loans letters sent.

5 THE COURT: I understand. I understand. But  
6 we're talking about August of 2010.

7 MR. BIZZARO: Okay.

8 THE COURT: That's when the education debt --

9 MR. BIZZARO: I see. I apologize again.

10 THE COURT: All right.

11 MR. BIZZARO: It's just a little confusing.

12 THE COURT: So, if anybody who received a  
13 Perkins loan letter --

14 MR. BIZZARO: Yes.

15 THE COURT: -- and who lived in New York  
16 City --

17 MR. BIZZARO: Yes.

18 THE COURT: -- received that letter after  
19 August 10 or August of 2010, then they would have  
20 received a letter that -- from Torres-Toback at a time  
21 when Torres-Toback did not have a license to collect  
22 debts in New York City.

23 MR. BIZZARO: That is correct, your Honor, yes.

24 THE COURT: So, they would be part -- they  
25 should be or at least they would theoretically be part of

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1 that subset of the class that falls in both the Perkins  
2 loan subset and the education debt subset.

3 MR. BIZZARO: I could see that -- the argument;  
4 yes, your Honor.

5 THE COURT: Now maybe the way that discovery  
6 proceeded and how you identified these people or you gave  
7 out numbers of these people, you -- there is no overlap.  
8 I don't know. But in other words, I guess what I am  
9 saying is the numbers that we've been given as to how  
10 many people fall in each of those subclasses -- subsets  
11 total 605.

12 MR. BIZZARO: Um-hum.

13 THE COURT: And in fact, that may be 605  
14 different people notwithstanding -- so that you know,  
15 that ultimately doesn't matter all that much.

16 MR. BIZZARO: Um-hum.

17 THE COURT: But I think Mr. Keshavarz was going  
18 down that road to say that perhaps the class -- perhaps  
19 everybody falls in both classes, but I don't think so.

20 MR. BIZZARO: Right.

21 MR. KESHAVARZ: I can --

22 MR. BIZZARO: I apologize for the confusion,  
23 your Honor. Yes, I -- yes, there may be some people who  
24 could fall into both classes based upon the fact at the  
25 time the firm did not have a debt collection license;

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1 yes.

2 THE COURT: Yes. But I don't know whether --  
3 well, not that it matters all that much, but it's also  
4 clear that there are people who don't fall into both.

5 MR. BIZZARO: Yes.

6 MR. KESHAVARZ: Because there would be people  
7 who are collecting Perkins loans that are outside of New  
8 York City?

9 THE COURT: That's one or people who were --  
10 they were seeking to collect some other kind of debt  
11 which wasn't a Perkins loan debt but some other kind of  
12 education debt, so that it didn't run afoul of the  
13 Perkins loan limitations on whatever -- the contractual  
14 limitations, I guess, which is the basis of the --

15 MR. BIZZARO: Correct. The larger group of  
16 individuals are non-Perkins loan individuals. They're  
17 different types of educational loans.

18 MR. KESHAVARZ: Well, if I may correct that.  
19 Actually, it's both educational -- that all educational  
20 debts.

21 THE COURT: Understood. But there are some  
22 people who had education debt that was not Perkins loan  
23 debt and therefore would fall outside of the Perkins loan  
24 subset.

25 MR. KESHAVARZ: Actually no, I rephrase that.

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1 There wouldn't be any loans that were Perkins loans  
2 because the -- well, actually I'm not certain about that.

3 THE COURT: We're not talking about just loans.  
4 We're talking about education debt.

5 MR. BIZZARO: The non-Perkins educational debt  
6 are the group of 400-something people. That is the --  
7 those are the non-Perkins educational debt. The 100  
8 some-odd people are the Perkins debt -- Perkins loans  
9 debt.

10 THE COURT: Right. no, I understand. I  
11 understand. Look, now as I said there's an easy way  
12 around it although it's not that easy because -- and  
13 maybe you could satisfy me on this by doing a little  
14 research but it's clear you can set up the different  
15 subclasses in a case.

16 The problem that appears to us -- and we  
17 haven't done exhaustive research, although my law clerk  
18 has done some amount of research but what appears to us  
19 is once you define subclasses, you need to have separate  
20 class representatives. Now, there is a bit of conflict  
21 of interest between the classes by the way. It's not --  
22 I don't think it's that major but, you know, one subclass  
23 being smaller than the other, that subclass might argue  
24 that they are entitled to a full one percent of the net  
25 worth.

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1 And since it would be divided among a smaller  
2 group of people, they would have a larger pro rata share  
3 of the settlement amount, so that let's take -- we've got  
4 34,000. Let's assume that that's two percent. If you  
5 divided that two percent in half, so that each subset got  
6 one percent, then the Perkins loan subset would get a  
7 bigger pro rata share than --

8 Now we're talking about only a few dollars  
9 actually. We're not talking about a big conflict of  
10 interest. So, it occurs there's that little conflict of  
11 interest and so one might argue that they should be  
12 separate class representative and separate class counsel,  
13 so that they could articulate their class' concerns a  
14 little bit -- you know, really articulate them.

15 Again, I know I'm not -- it's not that big a  
16 deal because it's only a few dollars. I think we're  
17 talking about the difference between \$50 as a statutory  
18 recovery and \$75 as a statutory recovery perhaps. And I  
19 might add that the education debt subset benefits by  
20 having a larger pool like it is in your settlement. They  
21 get a bigger pro rata share than they would if they only  
22 took their portion of one-half of the total fund, if you  
23 follow what I am saying. They get more.

24 On the other hand, the Perkins loan people get  
25 a lot more benefit because they get the benefit of having

1 a reconfigured debt. So, they get a large benefit from  
2 having that.

3 But anyway, we've looked at this pretty closely  
4 as you can see --

5 MR. KESHAVARZ: Yes.

6 THE COURT: -- and I do have the ultimate  
7 concern that the classes as now defined, it's difficult  
8 to really articulate that they meet Rule 23(a) and Rule  
9 23(b) requirements.

10 Now, I mean that's just my impression and  
11 again, I am opening it up to you to tell me how you feel  
12 about it. I mean, the other way to do it is just  
13 eliminate one of the subclasses. I don't know if that  
14 works or maybe you're satisfied having one representative  
15 for each of the two subclasses but that almost makes --  
16 if you follow what I am saying, I mean the -- having  
17 Ms. Torres be the class representative of both subclasses  
18 it's -- then why set up subclasses, if you're not going  
19 to have separate class counsel -- subclass counsel for  
20 each as I said; then why do that and go through that  
21 ministerial step which has no consequence whatsoever.

22 I mean the other -- as I started out saying,  
23 I'm pretty satisfied that this is a fairly beneficial  
24 settlement for everybody. The plaintiffs certainly get a  
25 pretty good result out of this, given the parameters and



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1 so I sort of don't want to throw up a roadblock but it's  
2 going to be -- I would have to acknowledge in any  
3 recommendation, even if I recommended that the class be  
4 certified, that there are real questions about whether  
5 class certification is appropriate under Rule 23(a) and  
6 (b).

7           So, my sort of preliminary conclusion is that I  
8 would be prepared to recommend the settlement because I  
9 think the settlement's ultimately good. But at the same  
10 time, would have to let Judge Garaufis know that the  
11 classes as defined now are -- I mean the class as defined  
12 now may not really meet Rule 23(a) and 23(b) requirements  
13 as they've been articulated by the Supreme Court,  
14 particularly in the more recent cases; you know, the  
15 Dukes case saw the -- and the Supreme Court has just  
16 generally been a little bit less sympathetic to class  
17 action now --

18           MR. KESHAVERZ: Putting it charitably.

19           THE COURT: -- class certification. Yes. So,  
20 let me ask you about how to justify that the plaintiff,  
21 assuming it would be recommended, how the Court would  
22 justify Ms. Torres getting it's almost -- I guess it's a  
23 fourth -- more than a fourth of the total amount of cash  
24 that's actually coming out.

25           MR. KESHAVERZ: I'd be glad to. There are a

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1 number of things. First, she's actually -- she has  
2 overpaid to the law firm. When you compare the amount  
3 that they said she owed based on a nine percent interest  
4 rate, which is impermissible, and a forty percent  
5 collection fee which we assert was impermissible, based  
6 on those numbers, they were telling her that she owed  
7 \$11,207.

8           Via the corrected accounting the defendants  
9 have agreed to, reducing the interest from nine to five,  
10 going back to -- I believe her loan was '86; you've got  
11 to -- from nine to five percent and then reducing the  
12 collection fee on top of that from forty to seven  
13 percent, the total amount that she would owe is only  
14 \$4,674. She's, in fact, overpaid by about \$5,000. She's  
15 paid \$6,700 in March 2011 and another 45 -- so, she's  
16 paid over -- about \$11,000 --

17           THE COURT: Okay, but --

18           MR. KESHAVERZ: -- and she's only owed -- she  
19 was only owed \$4,000. She was supposed to pay \$4,600  
20 under the terms of the settlement. So point being, she  
21 suffered damages.

22           THE COURT: Well, I understand that but I  
23 thought that everybody in the Perkins loan class was  
24 going to receive the benefit of having a recalculated  
25 debt.

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1 MR. KESHAVARZ: Well, that's true. That's  
2 true.

3 THE COURT: So that to the extent -- I mean,  
4 she was going to get that as a member of the class  
5 anyway.

6 MR. KESHAVARZ: Okay.

7 THE COURT: Now it did occur to us that there  
8 were claims that she had which are not part of the class  
9 based on harassing phone calls and so to the extent that  
10 there were psychological damages, maybe she is giving up  
11 those claims by the settlement.

12 So, of course everybody else is too but they're  
13 not being asserted as class -- on behalf of the class. I  
14 mean, is that -- I don't know.

15 MR. KESHAVARZ: If I may continue? Then the  
16 other things are she has for a number of months prior to  
17 our filing suit, she's come into my office on many  
18 occasions with stacks of papers. She's kept every piece  
19 of paper since 1986; every single one. And the only way  
20 I was able to find out there are these rolling -- these  
21 hidden fees because they were rolled in, you couldn't see  
22 them, is to run spreadsheet analysis based on every piece  
23 of paper she brought in.

24 So, she's devoted a lot of time, keeping the  
25 papers, organizing them for me, telling me each payment

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1 she's made on what date and why.

2 THE COURT: Um-hum.

3 MR. KESHAVARZ: The amounts in each letter that  
4 was claimed that was owed -- we would not have been able  
5 to spot --

6 THE COURT: Okay.

7 MR. KESHAVARZ: -- the claim if it wasn't for  
8 her long period of time in organizing it, coming to my  
9 office repeatedly. She turned down an offer of judgment  
10 in beginning of the case of I believe around \$5,000. So,  
11 she stuck with the class.

12 THE COURT: Um-hum.

13 MR. KESHAVARZ: She's put her own -- she put  
14 the class interests in front of her own. This case had  
15 been filed in 2011. It's been approximately what -- that  
16 will be three years. There will be deferred compensation  
17 for that entire period of time while she's sticking with  
18 the class and trying to move for certification and not  
19 just settling out only for herself.

20 So, those are all factors I think that would  
21 justify an increased incentive payment or whatever the  
22 proper term would be because of her investment in time  
23 and resources into this case.

24 THE COURT: So, the argument and I think it's a  
25 good one, is that she's not just a sort of figure-head

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1 plaintiff. She really did carry the ball in pursuing the  
2 case and in making the case possible.

3 MR. KESHAVARZ: That's correct.

4 THE COURT: Well, do you have any other  
5 thoughts or do you want to have some time to perhaps  
6 educate me a little further on the issues that I've  
7 raised? I mean, I'm --

8 MR. BROMBERG: Your Honor?

9 THE COURT: Give me just a moment.

10 MR. BROMBERG: Oh, sure.

11 (Pause)

12 THE COURT: Oh, by the way, one of the -- this  
13 is entirely technical. Your notice seems to be in error.  
14 You talk about a total fund of \$47,500, \$13,000- -- I'm  
15 looking at the first page and relief to the class --  
16 \$47,500, \$13,500 of which goes to the class  
17 representative, Ms. Torres. And then it says the balance  
18 of \$34,250. Well, the balance when you subtract \$13,500  
19 from \$47,500 is \$34. So, I don't know who is going to  
20 put up the 250 but the math is wrong. So, I'm presuming  
21 that must be \$34,000.

22 MR. KESHAVARZ: Yes.

23 THE COURT: Let me see if there's something  
24 else.

25 (Pause)

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1 THE COURT: Were all of the class -- this is  
2 more appropriate for Mr. Bizzaro.

3 Mr. Bizzaro, was your client collecting only on  
4 behalf of Columbia?

5 MR. BIZZARO: Yes, your Honor.

6 THE COURT: All of the class members were  
7 Columbia students at one time, I gather.

8 MR. BIZZARO: That's correct, your Honor.

9 THE COURT: I don't know if that matters but I  
10 was just curious as a matter of fact.

11

12 (Pause)

13 THE COURT: Just to add this; the differences  
14 in the claims between the two subsets, do -- I mean, the  
15 claims themselves have different value, in the sense that  
16 the education debt subset, their claim is a largely  
17 technical claim. It wasn't a collection of monies that  
18 weren't otherwise owed. And indeed, I think that there's  
19 considerable on about whether that constitute -- the fact  
20 that Torres-Toback didn't have a license actually  
21 constitutes a violation of the FTCPA. It seems like the  
22 weight of authority actually says it's not, although  
23 there's authority going both ways.

24 MR. KESHAVARZ: If I may speak on that. I  
25 believe it was actually almost universal, as far as I

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1 know, maybe almost -- maybe actually universal. If they  
2 didn't have a debt collection license and they threatened  
3 to do something that they're not allowed to do because of  
4 the failure to have a debt collection license,  
5 specifically threaten to file suit or actually filing  
6 suit, that's really the demarcation line in the cases  
7 that go no debt collection violation --

8 THE COURT: Okay.

9 MR. KESHAVERZ: -- or a debt collection  
10 violation. That's the demarcation.

11 THE COURT: These did -- these guys did  
12 threaten to file a lawsuit?

13 MR. KESHAVERZ: Or actually filed a lawsuit.

14 THE COURT: Or actually filed.

15 MR. KESHAVERZ: Yeah.

16 THE COURT: So, you would say that on that  
17 basis that the weight of authority would favor your --  
18 but nevertheless, the -- I mean it certainly appears to  
19 me that the Perkins debt -- subset have the more valuable  
20 claim in the sense that they actually out-of-pocket have  
21 actual damages and -- of course the settlement does  
22 acknowledge that and so it gives a valuable form of  
23 relief to that.

24 But because these claims have somewhat  
25 different values -- let's put it that way -- it calls

1 into question the adequacy of representation where one  
2 class representative seeks to represent both subclasses.  
3 And that's something I think that has been highlighted in  
4 several Second Circuit cases and even noted in --  
5 certainly when there are important differences between  
6 the -- any portions of the class, the Supreme Court has  
7 also called into question.

8 But anyway, I guess that's just a --

9 MR. BIZZARO: Your Honor, may I speak to that?

10 THE COURT: You may.

11 MR. BIZZARO: Just to clarify, with respect to  
12 the Perkins class, some of these individuals never paid a  
13 penny. So not all of them are receiving actual damages.  
14 I believe there's only -- by our calculations, only a  
15 handful of people that paid more than what's owed under  
16 the revised interest and collection fees.

17 So there will be a handful of people receiving  
18 the amount overpaid but the majority of them either paid  
19 nothing or paid less than that amount.

20 THE COURT: Okay. All right. Well, that --  
21 you know all these facts sort of assist in alleviating  
22 the concern that there are real big differences in terms  
23 of the subsets and that there are concerns about the fact  
24 that they don't meet some of the technical requirements  
25 of Rule 23 or not should not be fatal because ultimately,



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1 it does seem to me that the settlement serves everybody's  
2 interests.

3 MR. BIZZARO: Yes. And all of the Perkins  
4 class members will be receiving a corrected accounting.  
5 If there was a judgment that was entered, I guess the  
6 technical way of doing it that we've discussed is filing  
7 a partial satisfaction of judgment. So, if  
8 hypothetically there's a judgment against John Doe for  
9 \$10,000, there would be a \$5,000 partial satisfaction of  
10 judgment filed -- just throwing numbers out there  
11 hypothetically.

12 THE COURT: Yes, understood.

13 MR. BIZZARO: And whoever did not have a  
14 lawsuit commenced against them or a judgment obtained  
15 against them will receive correspondence stating that you  
16 now owe X amount.

17 THE COURT: All right. And that's a -- any  
18 such filing in a case where a judgment has been obtained,  
19 that does has real value.

20 MR. BIZZARO: Yes, I agree.

21 THE COURT: Anyway -- well, I've articulated my  
22 concerns. If you have anything further you want to add,  
23 you can do so now. And if you want to file something in  
24 response to what I've raised within a week or so, you can  
25 do that. I'm not going to require you to do that but I

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1 have to consider where -- how we're going to deal with  
2 this still because as I said, this --

3 MR. BIZZARO: Brian or Ahmad, do you have a  
4 position on this?

5 MR. BROMBERG: Your Honor, we would like the  
6 opportunity to submit some supplemental briefing. I do  
7 have some thoughts about Walmart v. Dukes. That was a  
8 very unusual case. Basically, if I recall correctly, the  
9 U.S. Supreme Court took a look at it and said you've got  
10 a class that basically alleges that anyone who is the  
11 subject of sexual discrimination or harassment isn't --  
12 is a member of the class and is entitled to damages. And  
13 there wasn't any evidence of any sort of company-wide  
14 policy with respect to the 20+ million who worked for  
15 Walmart.

16 THE COURT: It's clearly a whole different --

17 MR. BROMBERG: This was a very --

18 THE COURT: -- a whole different kind of case  
19 and I mean, I don't know that -- and it wasn't a  
20 settlement class.

21 MR. BROMBERG: No.

22 THE COURT: I mean, this was a --

23 MR. BROMBERG: And that was my next point.

24 THE COURT: Yes.

25 MR. BROMBERG: You know, it wasn't a settlement

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1 class. We have a settlement class here, so a lot of  
2 those, you know -- there's case law saying that in  
3 settlement classes, a lot of the concerns about  
4 predominance and a lot of the concerns about  
5 manageability sort of go to the side a little bit.

6 THE COURT: I understand that but these are not  
7 manageability issues. And, in fact, there's significant  
8 language in Supreme Court cases that says in settlement  
9 classes, you know, while you might put a -- back burner  
10 any manageability issues, the other issues still require  
11 close attention and may even require closer attention in  
12 a settlement context because -- well, they may even  
13 require closer attention. But in any event --

14 MR. BROMBERG: There's also another issue here  
15 which is that as I was saying about the Dukes case, you  
16 have a situation where the entire class definition and  
17 the entire statement of what the alleged violation was  
18 sort of amorphous. Anyone who has been subject to sexual  
19 discrimination or harassment, you couldn't draw a line.

20 Here we've got very particular violations that  
21 we can specify. Here's the alleged violation. Were they  
22 required to be licensed? If they were required to be  
23 licensed, is that a violation of the FTCPA that gives  
24 rise to statutory damages? A very careful, narrow --

25 THE COURT: And that's how I started out.

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1 MR. BROMBERG: Right.

2 THE COURT: We've got two subsets. As to each  
3 of the subsets, I would have no problem finding that that  
4 subset has common questions of fact that predominate.  
5 And I mean since it would be a single violation, we have  
6 no question about adequacy of representation.

7 The problem is that we've got two disparate  
8 subsets and that's where there seems from a technical  
9 standpoint, because there is no common question that goes  
10 across both classes --

11 MR. BROMBERG: Well --

12 THE COURT: -- that starts -- and because the  
13 nature of the claims are substantially different. You  
14 know, both of them arise from a letter but the letter --  
15 the violation is a real different violation in one group  
16 of letters from the other giving rise to different --  
17 substantially different interests in the kind of recovery  
18 that's appropriate.

19 Now the settlement meets the -- satisfies those  
20 differences, at least -- each class is getting a good --  
21 each subset of the class is getting a good result, it  
22 seems to me. So, as I said at the outset, my concern is  
23 not the fairness of the overall settlement. It's the  
24 fact that there are some technical deficiencies or  
25 technical problems that I need some satisfaction. Either

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1 that or I'll just have to make a final decision about  
2 whether I recommend the settlement, notwithstanding that  
3 -- or certification and then ultimately the settlement  
4 preliminarily, notwithstanding that, you know, Rule 23(a)  
5 has to be fudged a little bit.

6 MR. BROMBERG: There are a couple of other  
7 matters here. For instance, there's the leading case on  
8 the issues -- some of the issues here which was Keele v.  
9 Wexler. It's a Seventh Circuit case. It's been followed  
10 regularly in this circuit.

11 THE COURT: Okay. So bring it to my attention  
12 in --

13 MR. BROMBERG: I will.

14 THE COURT: -- something that you -- I'm glad  
15 to give you some time to put something in writing. It  
16 doesn't have to be real extensive but --

17 MR. BROMBERG: Well, in Keele v. Wexler, the  
18 class representative Keele, was allowed by the Seventh  
19 Circuit to represent all the people in the class even  
20 though Ms. Keele hadn't suffered actual damages, she had  
21 the right to pursue both statutory damages and actual  
22 damages on behalf of the other class members. In other  
23 words -- and so even though her damages were different,  
24 the violation was the same. Therefore, she had the right  
25 to pursue those damages on behalf of everyone else.

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1 THE COURT: Right, but here the violation is  
2 not the same. That's the difference.

3 MR. BROMBERG: Well, she suffered both  
4 violations if I recall correctly.

5 MR. KESHAVARZ: She did.

6 MR. BROMBERG: She did.

7 THE COURT: She did.

8 MR. BROMBERG: So, she's got standing to  
9 represent both classes.

10 THE COURT: That's not the issue either.

11 MR. BROMBERG: Okay.

12 THE COURT: The issue is the difference between  
13 the two violations and how that effects the analysis  
14 under Rule 23(a).

15 MR. BROMBERG: Well, the other --

16 THE COURT: Because if Keele -- Keele may have  
17 -- there was a single type of violation that gave rise to  
18 multiple or to different kinds of damages but there was a  
19 single type of violation. So, you have a common question  
20 there. There's no question; did the violation occur?  
21 Was it a violation of the FTCFA? Right? Those are  
22 common questions that go across the entire class.

23 Here we have two sets of violations and that's  
24 the problem and I have to bridge that. And there's no  
25 clear overlap between the two types of violations, other

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1 than that they came out of a letter. And I don't think  
2 that that's enough.

3 MR. BROMBERG: The statutory damages are an  
4 interesting question because my understanding of  
5 statutory damages is they serve two purposes; number one  
6 is when you've got a straight letter violation or any  
7 kind of violation for that matter, if the person hasn't  
8 -- it's very hard to specify the actual damages. So, the  
9 statutory damages are sort of brought into give rough  
10 justice. To say you know what? We know in these  
11 situations where the only violation is a letter, it's  
12 hard to specify what the damages are. Therefore, we're  
13 going to give you a little bit of money because we know  
14 (a) you're going to have trouble proving the actual  
15 damages; (b) figuring out a correct amount for that is  
16 difficult and (c) we want a deterrent effect here. We  
17 want to make sure -- it's like the equivalent of a  
18 parking ticket. Everyone who parks in front of the fire  
19 hydrant gets a ticket.

20 If the difference is a few dollars between  
21 them, that's the nature of the remedies set forth in  
22 6092(k).

23 THE COURT: I'm not disagreeing with you. I'm  
24 not as concerned -- as I said, I'm not that concerned  
25 about the fairness --

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1 MR. BROMBERG: Right.

2 THE COURT: -- of the settlement. I'm not  
3 concerned that somebody is -- and any member of one  
4 subset that's not a member of the other is somehow  
5 getting less than they otherwise would get. I mean,  
6 frankly my guess ultimately would be that if there were  
7 two subclasses and they really were separately  
8 represented by counsel, you'd probably end up with a  
9 settlement that's largely the same as the one that's here  
10 anyway.

11 So, I'm not -- again, that's not --  
12 highlighting some issues that we are not comfortable we  
13 have an absolutely correct answer to in presenting to  
14 Judge Garaufis a recommendation that the class  
15 certification requirements that are annunciated by the  
16 Supreme Court and in the rules are actually met. But  
17 I've articulated the concerns I have.

18 MR. BROMBERG: Right.

19 THE COURT: To the extent that you have  
20 something that you can -- if you want to cite to me some  
21 cases that may help me see past these issues, happy to  
22 have you give me that. I haven't made a final decision  
23 about how I am going to deal with this. I've sort of  
24 given you a clue but anything you can do to help me would  
25 be useful.



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1 MR. BROMBERG: I think we absolutely need to  
2 submit some additional briefing.

3 THE COURT: Okay. I don't want --

4 MR. BROMBERG: The --

5 THE COURT: It doesn't have to be extensive but  
6 just, you know --

7 MR. BROMBERG: Right. I mean right now I'm  
8 just riffling. I need a little time to sit down and --

9 THE COURT: Sure.

10 MR. BROMBERG: -- go over everything.

11 THE COURT: Absolutely. Okay. So, a week, two  
12 weeks?

13 MR. KESHAVERZ: Two weeks, your Honor.

14 THE COURT: Okay. So, we'll hold off doing  
15 anything for two weeks. We've got a substantial draft  
16 already ready, so it's not a -- it's a matter of just  
17 finishing it off with a final decision.

18 I don't think there's any other issue I had.  
19 Let me just --

20 (Pause)

21 THE COURT: The scope of the release that the  
22 settlement would contemplate would go, it seems to me, to  
23 all of the claims made in the complaint, even claims that  
24 are not pursued as part of the -- that are not part of  
25 the settlement class, if you follow what I am saying.

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1 I believe this is the -- part of the plaintiffs  
2 claims here involve harassment in telephone  
3 communications or something along that line.

4 MR. KESHAVARZ: She didn't have harassment in  
5 telephone communications. She did have letters that  
6 threatened -- that said there was a judgment entered when  
7 there was no judgment entered. And that court documents  
8 that looked like court papers when they were  
9 fabrications, they weren't court papers. That's --

10 THE COURT: And so the release would extend to  
11 any claims like that, it seems to me and I'm not sure  
12 that that would be appropriate in the circumstances since  
13 -- I mean because the release, certainly for Ms. Torres,  
14 would be appropriate. She's entitled to do that. But  
15 the class would be precluded, if that's what's  
16 contemplated by the scope of the release. And I'm  
17 looking --

18 MR. KESHAVARZ: I believe the --

19 MR. BIZZARO: I don't believe that's what's  
20 being contemplated.

21 MR. KESHAVARZ: Yeah, I believe if you look at  
22 docket entry 93-3 (sic), page 13, item 35, the last  
23 sentence beginning with roman numeral I, I believe the  
24 claimant --

25 THE COURT: 93? I'm sorry?

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1 MR. KESHAVARZ: Let me start from the  
2 beginning; docket entry 69-3 --

3 THE COURT: Okay.

4 MR. KESHAVARZ: -- page 13 of 30.

5 THE COURT: Okay.

6 MR. KESHAVARZ: Item number -- paragraph 35 --

7 THE COURT: Got it.

8 MR. KESHAVARZ: -- release to the class  
9 members. If you look at the last sentence, I believe the  
10 class members are -- it's not the claims in the suit.  
11 Those claims in the suit are further narrowed to the  
12 calculation of the amount of the debt. The claims  
13 regarding unlicensed debt collection and anything -- a  
14 violation related to those letters. But other claims  
15 they might have, not to those specific elements in the  
16 complaint are preserved.

17 THE COURT: Well the --

18 MR. KESHAVARZ: So, retracting the very  
19 specifics --

20 THE COURT: -- sub little iii says "Claims  
21 involving alleged violations of the FTCPA arising from or  
22 related to the matters referenced in the documents  
23 identified in the amended complaint of this lawsuit,"  
24 which documents I presume are the letters that Ms. Torres  
25 obtained, which letters had some of the things that you

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1 were saying; that is, said there was a judgment entered  
2 when no judgment was entered. Said there was a lawsuit  
3 filed or whatever, so that it seems to me that that  
4 aspect of the release may be over broad.

5 MR. KESHAVERZ: So if we limit it -- just so I  
6 understand, your Honor --

7 THE COURT: 1 and 2, clearly.

8 MR. KESHAVERZ: Got it.

9 THE COURT: Because those are encompassed  
10 within the class settlement. Ms. Torres being here can  
11 -- I mean, I suppose you could have her release all of  
12 her claims but the class, it seems to me, would not.

13 MR. KESHAVERZ: Yeah, we tried very hard to  
14 limit the class' release --

15 THE COURT: To what is --

16 MR. BROMBERG: That's why we --

17 THE COURT: -- yes, okay.

18 MR. BROMBERG: Yeah, that's why we have for  
19 instance, romanette V.

20 THE COURT: Romanette V? In the --

21 MR. BROMBERG: Each class member reserves his  
22 or her defenses.

23 THE COURT: Right.

24 MR. BROMBERG: We tried to --

25 THE COURT: You mean talking about in 69(3).

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1 MR. BROMBERG: Exactly.

2 THE COURT: At Romanette V on in paragraph 35  
3 of the --

4 MR. BROMBERG: Right. We tried our best to  
5 keep the --

6 THE COURT: Okay.

7 MR. BROMBERG: -- class release as narrow as  
8 possible.

9 THE COURT: Well, if we do it to 1 and 2, I  
10 think we've got no -- when we do it to the -- in, as you  
11 call it, romanette i, sub (1) and (2), then I don't think  
12 that we have any problem as a practical matter. I doubt  
13 that anybody's going to be bringing any claims now  
14 anyway.

15 I had one other thought that just is relatively  
16 minor but -- oh, one thing did strike me and there is a  
17 requirement that anyone who wishes to have their  
18 objection actually considered, even if they submit  
19 something in writing, they have to actually appear in  
20 person. And so that any -- and I'm not sure I understand  
21 why you are requiring that. Do you follow what I am  
22 saying?

23 MR. KESHAVERZ: We have no problem eliminating  
24 that requirement, your Honor.

25 THE COURT: Yes. I mean I think that in

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1 fairness, if somebody for whatever reason, wants to file  
2 an objection, they should be able to do that in writing  
3 and not have to come here and have the Court consider it.

4 MR. KESHAVARZ: That's fine.

5 THE COURT: Okay.

6 MR. KESHAVARZ: I don't have a --

7 THE COURT: So there's not --

8 MR. BIZZARO: I don't have an issue waiving  
9 that either, your Honor.

10 THE COURT: Okay. All right. So, we won't do  
11 anything for the next couple of weeks. If you want to  
12 file something, we certainly will consider it and I think  
13 that's all I have.

14 Mr. Bizzaro, do you have anything else you  
15 wanted to say?

16 MR. BIZZARO: Yes, the only other issue we  
17 didn't discuss and I don't know if it's appropriate to  
18 discuss it now is the what's going to be the largest part  
19 of the settlement is the attorney's fees issue. I mean,  
20 we stipulated that we would attempt to resolve it amongst  
21 ourselves or if not, a petition would be submitted to the  
22 Court.

23 So, I just wanted to clarify your Honor had no  
24 questions or comments about that portion of the  
25 settlement.

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1 THE COURT: It's entirely appropriate.

2 MR. BIZZARO: Right. Okay.

3 THE COURT: Absolutely. It's the best way to  
4 keep the settlement fund from being -- you know, disputes  
5 over attorney's fees to invade the settlement fund and  
6 otherwise affect those negotiations.

7 MR. BIZZARO: Right.

8 THE COURT: So, no I prefer -- it seems to me  
9 that's a fairer way to do it than to take it out of the  
10 fund.

11 MR. BIZZARO: All right. Okay. Thank you,  
12 your Honor.

13 THE COURT: All right. Thank you.

14 MR. KESHAVERZ: Thank you, your Honor.

15 MR. BROMBERG: Thank you.

16 MR. BIZZARO: Thanks.

17 (Matter concluded)

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C E R T I F I C A T E

I, LINDA FERRARA, hereby certify that the foregoing transcript of the said proceedings is a true and accurate transcript from the electronic sound-recording of the proceedings reduced to typewriting in the above-entitled matter.

I FURTHER CERTIFY that I am not a relative or employee or attorney or counsel of any of the parties, nor a relative or employee of such attorney or counsel, or financially interested directly or indirectly in this action.

IN WITNESS WHEREOF, I hereunto set my hand this 14th day of March, 2014.



Linda Ferrara

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